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No. 201

In the Supreme Court of the United States

OCTOBER TERM, 1960

PENNSYLVANIA TURNPIKE COMMISSION, PETITIONER

v.

EDGAR A. MCGINNES, District Director of Internal Revenue, MANU-MINE RESEARCH AND DEVELOPMENT COMPANY, and SEABOARD SURETY COMPANY

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE DISTRICT DIRECTOR OF INTERNAL REVENUE IN OPPOSITION

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OPINIONS BELOW

The opinion of the district court (R. 16a-24a) is reported at 179 F. Supp. 578. The opinion of the court of appeals (Pet. 1a-2a) is reported at 278 F. 2d 330.

JURISDICTION

The judgment of the court of appeals was entered on May 24, 1960 (Pet. 3a). The petition for a writ

of certiorari was filed on June 30, 1960. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether petitioner's action to compel the performance of a ministerial duty by the District Director of Internal Revenue is premature, since the Director does not have such a duty at this time.

2. Whether a federal court, upon removal of a cause from a state court, has jurisdiction to enjoin the Director, a federal officer, from taking official action within the scope of his statutory power and to direct the manner in which the functions of his office shall be performed.

STATUTE INVOLVED

Internal Revenue Code of 1954 (26 U.S.C.):

> SEC. 6402. AUTHORITY TO MAKE CREDITS OR REFUNDS.
>
> (a) *General Rule.*—In the case of any overpayment, the Secretary or his delegate, within the applicable period of limitations, may credit the amount of such overpayment, including any interest allowed thereon, against any liability in respect of an internal revenue tax on the part of the person who made the overpayment and shall refund any balance to such person.
>
> * * * *

STATEMENT

This action was brought by petitioner to enjoin the District Director of Internal Revenue, Philadelphia,

from making payment on a tax refund claim to respondent Manu-Mine Research & Development Company, and to require the Director to pay any amounts due under that claim to petitioner upon a determination that the latter has an equitable interest in the claim (R. 2a-4a). Petitioner also seeks an injunction prohibiting Manu-Mine from attempting to create any rights to the refund claim in respondent Seaboard Surety Company (R. 4a). Pursuant to motions by respondents Manu-Mine and Seaboard, the district court dismissed the case as to the Director and remanded petitioner's claim against the other two parties to the state court from which this action had been removed (R. 16a-25a). The court of appeals affirmed (Pet. 1a-2a). The relevant facts are as follows:

In 1956, Manu-Mine paid more than $1,000,000 in income taxes to the Director for its 1955 taxable year (R. 2a). Petitioner alleges in its complaint (R. 2a-3a) that Manu-Mine had previously obtained this money from it by fraud. The following year Manu-Mine purported to assign to Seaboard any interest it had in the 1955 taxes and, thereafter, applied to the Director for a refund, based upon a carry-back loss, of approximately $900,000 for that year (R. 3a).

Petitioner brought an action against Manu-Mine in a Pennsylvania court for the allegedly fraudulent acquisition by the latter of the funds with which it paid its 1955 taxes (R. 16a). The Supreme Court of Pennsylvania upheld a preliminary injunction

freezing the assets of Manu-Mine (*Pennsylvania Turnpike Commission* v. *Evans*, 392 Pa. 110, 139 A. 2d 530), and that suit is still pending on the merits.

Petitioner then instituted an original action in the federal district court, seeking the same relief sought here. The district court denied defendants' motions to dismiss, but the court of appeals reversed, holding that there was no federal jurisdiction. *Pennsylvania Turnpike Commission* v. *McGinnes*, 169 F. Supp. 580 (E.D. Pa.), reversed, 268 F. 2d 65 (C.A. 3), certiorari denied, 361 U.S. 829. Petitioner thereupon filed this action in the Pennsylvania state court (R. 16a). Apart from the difference in the forums in which they originated, this suit is identical in all respects to the prior action brought in the district court. The Director removed the case to the district court under 28 U.S.C. 1442(a)(1) (R. 6a-7a). The district court dismissed the case as to the Director and remanded the action against the remaining defendants to the state court from which it had been removed (R. 25a). The court of appeals affirmed.

ARGUMENT

1. Petitioner seeks in this action to enjoin the Director from making refund payments to Manu-Mine and to direct him to pay petitioner instead. While the Director is the nominal defendant here, the relief requested would control the administration of his federal office, and, consequently, this action cannot be brought without the consent of the United States. *Larson* v. *Domestic & Foreign Corp.*, 337

U.S. 682; *Land* v. *Dollar*, 330 U.S. 731, 738. In apparent recognition of that defect, petitioner contends that this action merely seeks to control the ministerial duty of the Director to make payment "after the refund has been allowed" and, therefore, is not a suit against the United States (Pet. 6). In fact, however, since the claim for refund has not been acted upon, the Director has no present duty to make payment. Thus petitioner seeks now to enjoin the Director from failing to comply with an administrative duty which may or may not arise at some future date. If suits could be maintained against Government officials on the mere speculation of future occurrences, it would soon constitute an intolerable burden upon the public administration. The Government would be subjected to endless litigation by creditors of individuals who had potential claims against it. Petitioner fails to cite any case in which a suit of this kind has been maintained,* and we also have been unable to find any authority for it. To the contrary, every suit of this kind that we located involved an already existing ministerial duty. *E.g.*, *Houston* v. *Ormes*, 252 U.S. 469; *Mellon* v. *Orinoco Iron Co.*, 266 U.S. 121, and *Doerschuck* v. *Mellon*, 55 F. 2d 741 (C.A. D.C.). Accordingly, petitioner's action, as one premised upon the power to enforce performance of a ministerial duty, is premature.

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* In *Houston* v. *Ormes*, 252 U.S. 469, 472-473, upon which petitioner relies (Pet. 6), it was conceded that the Secretary of Treasury had a then-existing ministerial duty which was the subject of the litigation.

2. An additional ground supporting the decision below is that a state court lacks jurisdiction to control the performance by a federal officer of his official duties. Since this action was removed from a state court, the jurisdiction of the district court is derived from and coincides with that of the state court. *Lambert Co.* v. *Baltimore & Ohio R.R. Co.*, 258 U.S. 377, 382; *Minnesota* v. *United States*, 305 U.S. 382, 389.

It is axiomatic that a state court lacks power to control a federal officer in the exercise of his official functions. *McClung* v. *Silliman*, 6 Wheat., 598. See also, *Tarble's Case*, 13 Wall. 397, *Ableman* v. *Booth*, 21 How. 506; *McCulloch* v. *Maryland*, 4 Wheat. 316, 436; *Kendall* v. *United States*, 12 Pet. 524, 617; *In re Blake*, 175 U.S. 114, 119. As this Court held in *McClung*, under the federal system, a federal officer may be controlled only by the federal Government and, therefore, a state court cannot interfere with the performance of his work. The decision of this Court in *Brooks* v. *Dewar*, 313 U.S. 354, does not, as petitioner asserts (Pet. 7), conflict with the above-mentioned principle. Although that case did present, *inter alia*, the question whether a state court could enjoin a federal officer, this Court expressly refrained from passing on that and other jurisdictional issues because the plaintiff's bill was so clearly defective on the merits.

3. The petitioner has already brought an action against Manu-Mine in a Pennsylvania court and obtained a preliminary injunction freezing the latter's assets. See *Pennsylvania Turnpike Commission* v.

Evans, 392 Pa. 110, 139 A. 2d 530. As both courts below noted, if that order does not provide sufficient protection, petitioner can undoubtedly obtain whatever additional relief it needs against Manu-Mine from the state court (Pet. 2a). Since the appropriate remedy for petitioner is in its action against Manu-Mine, this cause is of neither immediate nor recurring importance. And, as noted above, the decision below is not in conflict with the decision of any appellate court.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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